

## SPECIAL COMMUNICATION

# Tobacco industry statements in the US Department of Justice lawsuit

Prepared for Rep. H A Waxman

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### EXECUTIVE SUMMARY

Over the last half century, the tobacco industry has earned billions of dollars in profits by selling a deadly and addictive product while denying its harmfulness. As criticism of the industry has accelerated in recent years, and calls for product regulation have grown, tobacco companies have defended themselves by saying they are now "responsible" corporations that aim to communicate honestly about their products.

A test of whether the industry has reformed is the truthfulness of company statements made under penalty of sanction in a court of law. At the request of Rep. Henry A Waxman, this report examines recently submitted filings by the five largest cigarette manufacturers in the civil suit brought by the United States Department of Justice (DOJ). The report assesses the truthfulness of company positions on three critical health issues: (1) the health effects of smoking; (2) the health effects of environmental tobacco smoke; and (3) the addictiveness of nicotine. The report also examines three companies' statements about previously controversial issues: Philip Morris's statements on control of nicotine, RJ Reynolds's statements on marketing to children, and British American Tobacco's statements on document destruction.

The report finds that when forced to take legally binding positions, the tobacco industry still does not accept scientific consensus about the harms of their products. Despite overwhelming agreement among experts that cigarettes cause disease in smokers, that environmental tobacco smoke causes disease in nonsmokers, and that nicotine is addictive, the report finds:

- *Four of five major tobacco companies still question whether smoking causes disease*—That smoking causes lung cancer, heart disease, emphysema, and other diseases is universally accepted by medical and scientific authorities. Yet Lorillard, British American Tobacco, and Brown & Williamson still qualified their statements on causation, and RJ Reynolds acknowledged only that smoking "may contribute to causing . . . diseases in some individuals".
- *All five major tobacco companies deny that environmental tobacco smoke causes disease in non-smokers*—Medical and scientific organisations that have found that environmental tobacco smoke causes disease include the US Surgeon General, the World Health Organization, and the American Medical Association. Yet the five leading tobacco companies all indicated that they disagree. Three of these tobacco companies, Philip Morris, British American Tobacco, and Brown & Williamson, admitted only that environmental tobacco smoke can be "irritating" or "annoying" to non-smokers.
- *Four of five major tobacco companies fail to admit that nicotine is addictive*—Medical and scientific authorities uniformly agree that nicotine is addictive. Yet Lorillard stated that "after reasonable inquiry . . . the information known or readily obtainable by Lorillard is insufficient to enable Lorillard to further admit or deny" that nicotine is addictive. Philip Morris, RJ Reynolds, and British American Tobacco dodged the question.

The report also finds that individual tobacco companies are unwilling to take responsibility for well documented corporate behaviour. The report documents:

- *Philip Morris continues to deny it has control over nicotine*—In 1996, former company scientists explained in detail how the company used a multitude of methods with the goal of "controlling the nicotine levels". Yet in its court filing, Philip Morris still denied it "'controls' the nicotine content of its cigarette filler or the . . . nicotine yields of cigarette smoke".
- *RJ Reynolds continues to deny it has marketed to children*—Dozens of internal company documents show that RJ Reynolds planned to "[d]irect advertising appeal to the younger smokers" as young as 14 years of age. Yet in its court filing, RJ Reynolds stated it "is not aware that any of its marketing programs from 1954 to the present have targeted persons under the age of 18".
- *British American Tobacco continues to deny document destruction*—An Australian court has recently determined that a British American Tobacco subsidiary destroyed thousands of documents to defeat smoking and health lawsuits. Just last month, a former general counsel and consultant of British American Tobacco admitted under oath that one purpose of the company's "document retention policy" was to prevent documents from being used in litigation. Yet in its court filing, British American Tobacco denied it ever "destroyed, caused to be destroyed, or [was] aware of the destruction of documents because the documents would have been adverse to [British American Tobacco] if they had been produced in discovery during smoking and health litigation".

### BACKGROUND

Over the last half century, the tobacco industry has earned billions of dollars in profits by selling a deadly and addictive product while denying its harmfulness. As criticism of the industry has accelerated and calls for regulation have increased, tobacco companies have cast themselves as newly reformed, responsible corporate entities.<sup>1</sup> Philip Morris Incorporated plans to "[c]ommunicate openly, honestly and effectively about the health effects of [its] products".<sup>2</sup> Brown & Williamson Tobacco Corporation calls itself a "responsible company in a controversial industry".<sup>3</sup> British American Tobacco (Investments) Limited refers to "[c]orporate responsibility in a controversial sector".<sup>4</sup> RJ Reynolds Tobacco Company maintains that it conducts its business "in a responsible and ethical manner, recognizing the risks associated with the use of cigarettes, and committed to being a constructive participant in various public policy issues involving cigarettes".<sup>5</sup> Lorillard Tobacco Company speaks of its "continuing commitment to social responsibility".<sup>6</sup>

Recent analyses have cast doubt on the industry's claims that it has changed. A study published in the *New England Journal of Medicine* found that the industry continues to spend millions of dollars to advertise in youth oriented magazines,

with advertising in the year 2000 reaching “more than 80 percent of young people in the United States an average of 17 times each.”<sup>7</sup> A California state court found in June 2002 that RJ Reynolds has targeted children in its magazine advertising; it fined the company \$20 million.<sup>8</sup>

These recent developments, while revealing, do not address the question of whether the “new” tobacco industry now consistently tells the truth on key scientific and corporate issues. A test of the industry’s commitment to truth is the veracity of company statements made under penalty of sanction in a court of law. Such statements have been submitted as part of the discovery process in a civil suit filed by DOJ in 1999 alleging violation of the Racketeer Influenced and Corrupt Organizations Act (RICO). Among other charges, the complaint states that tobacco companies have conspired to deceive the American public about the effects of smoking and the addictiveness of nicotine.<sup>9</sup> If the industry has changed, then no such deception should be evident in the official positions the companies have taken in litigation.

At the request of Rep. Henry A Waxman, the Special Investigations Division of the minority staff of the Government Reform Committee has reviewed hundreds of pages of pre-trial documents to assess whether companies are now consistently telling the truth. This report presents the results of this investigation. It examines statements made by the five largest tobacco companies on three critical health issues: (1) the health effects of smoking; (2) the health effects of environmental tobacco smoke; and (3) the addictiveness of nicotine. The report also examines three companies’ statements about their individual corporate behaviour: Philip Morris’s statements on manipulation of nicotine in cigarettes; RJ Reynolds’s statements on marketing to children; and British American Tobacco’s statements on document destruction.

## METHODOLOGY

The DOJ lawsuit has a trial date of 15 September 2004. Since the initial complaint was filed, the parties have been participating in a pre-trial process by which they seek facts and information about the case from the other side. This process includes two forms of written questions that pass between DOJ and the defendants. The first are called “interrogatories”, which are designed to elicit information such as the identification and location of documents relating to a particular subject, identification of individuals with knowledge about a particular subject, or further details about issues in the case. The second are called “requests for admission”, in which one party will ask another party to admit or deny the truth of a statement, thereby narrowing the issues that must be resolved during the trial. The Special Investigations Division has obtained copies of the interrogatories, requests for admission, and the responses by the parties that were served as of 19 April 2002, except for those items sealed for confidentiality reasons.

The pre-trial process has produced industry statements on three key health issues: the health effects of smoking, the health effects of environmental tobacco smoke, and the addictiveness of nicotine. Responses of the five largest tobacco companies in the litigation were reviewed: Philip Morris, which produces Marlboro cigarettes; RJ Reynolds, maker of the Camel and Winston brands; British American Tobacco, maker of Lucky Strike cigarettes; Brown & Williamson, which produces the Kool brand; and Lorillard, maker of Newport cigarettes.

The following specific DOJ requests were assessed:

- *Health effects of smoking*—In an interrogatory, DOJ asked each company to “[l]ist [e]ach disease or medical condition that you have concluded is caused by smoking cigarettes”.<sup>10</sup> The Special Investigations Division reviewed the responses and assessed whether the company stated, with or without qualification, that smoking causes at least one disease.
- *Health effects of environmental tobacco smoke*—In a request for admission, DOJ asked each company to “[a]dmit that envi-

ronmental tobacco smoke (‘ETS’) causes disease in some people”.<sup>11</sup> The Special Investigations Division assessed whether each company admitted, with or without qualification, that environmental tobacco smoke causes at least one disease.

- *Addictiveness of nicotine*—In a request for admission, DOJ asked each company to “[a]dmit that nicotine is a substance in cigarettes that is addictive.”<sup>11</sup> The Special Investigations Division assessed whether the company admitted, with or without qualification, that nicotine is addictive. In cases where companies did not state that nicotine is addictive, but did state that cigarette smoking is addictive, the Special Investigations Division assessed whether the companies stated that their conclusion about the addictiveness of smoking was related to nicotine.

The pre-trial process also covered three specific areas of corporate behaviour that have brought significant attention to specific tobacco companies over the years: manipulation of nicotine by Philip Morris, marketing to children by RJ Reynolds, and document destruction and British American Tobacco. To assess the truthfulness of the companies’ responses in these areas, the following additional DOJ requests were examined:

- *Manipulation of nicotine by Philip Morris*—DOJ asked Philip Morris to “[a]dmit that you are able to alter and/or control the amount of nicotine in your cigarettes as they are manufactured”; “[a]dmit that you do alter and/or control the amount of nicotine in your cigarettes as they are manufactured”; “[a]dmit that you are able to alter, affect, and/or limit the amount of nicotine delivered to the smoker[s] of your cigarettes”; and “[a]dmit that you are able to alter and/or control the nicotine-to-tar ratio in your cigarettes as manufactured.”<sup>11</sup> The Special Investigations Division reviewed the responses to these questions and assessed whether the company admitted it controlled the amount of nicotine or delivery of nicotine of its cigarettes.
- *Marketing to children by RJ Reynolds*—DOJ asked RJ Reynolds to “[a]dmit that, at various times from 1954 to the present, you have targeted marketing to persons under 18 years of age.”<sup>11</sup> The Special Investigations Division assessed whether the company acknowledged any efforts to market to children in this time period.
- *Document destruction and British American Tobacco*—DOJ asked British American Tobacco to “[a]dmit that, at some point from 1954 to the present, you have destroyed, caused to be destroyed, or were aware of the destruction of documents because the documents would have been adverse to you if they had been produced in discovery during smoking and health litigation or otherwise.”<sup>11</sup> The Special Investigations Division assessed whether British American Tobacco acknowledged the destruction of any documents for this purpose.

## RESULTS

### A. Four of five tobacco companies still question whether smoking causes disease

Thousands of scientific studies and the expert opinion of every relevant medical and scientific organisation have concluded that cigarette smoking causes disease, including lung cancer, heart disease, emphysema, and other chronic obstructive pulmonary disease.<sup>12</sup>

Despite this consensus, most of the tobacco companies still do not agree. In the pre-trial process in the DOJ case, when asked to “[l]ist [e]ach disease or medical condition that you have concluded is caused by smoking cigarettes”, only one of the five tobacco companies, Philip Morris, stated without qualification that smoking causes disease. Philip Morris agreed “with the overwhelming medical and scientific

consensus that cigarette smoking causes lung cancer, heart disease, emphysema and other serious diseases in smokers".<sup>13</sup>

Of the four other major tobacco companies, all failed to admit without qualification that smoking causes disease. RJ Reynolds took the position that "cigarettes . . . *may contribute* to causing . . . diseases in some individuals"<sup>14</sup> [emphasis added]. RJ Reynolds also conceded "that it has not admitted that cigarette smoking has caused a specific disease in a specific person".<sup>15</sup>

The remaining three tobacco companies stated only with qualifications that smoking caused disease. These companies appeared to be supporting the discredited position that population based or epidemiological studies cannot prove that smoking causes disease. This is essentially the same stance that was adopted industry wide in a secret 1977 meeting near Bath, UK.<sup>16</sup>

Specifically, the other three companies responded as follows:

- Lorillard stated that it "agrees with the Surgeon General and other public health authorities that, based on the epidemiological standard of causation, cigarette smoking can be a cause of lung cancer, heart disease and chronic obstructive pulmonary disease, including emphysema."<sup>17</sup> In other pre-trial filings, Lorillard qualified this response by distinguishing between "an epidemiological standard of causation" and a "more rigorous traditional scientific standard", explaining:

[A]t least two standards for establishing causation exist. An epidemiological standard of causation, based primarily on statistical evidence, has been used by the Surgeon General and other public health authorities for public health purposes since 1964. The more rigorous traditional scientific standard for establishment of causation also still exists and requires, among other things, an understanding of the biological mechanism by which lung cancer develops or replication of human type lung cancer in well-designed and conducted animal experiments involving inhalation of cigarette smoke.<sup>18</sup>

The company further stated that it "continues to recognize the validity of the traditional scientific standards of causation and believes that in some circumstances it is reasonable to apply these standards".<sup>18</sup>

- British American Tobacco noted that it "accepts, in the most simple and commonly understood sense, that smoking is a cause of certain serious diseases, such as certain cancers, including lung cancer, chronic obstructive pulmonary disease and cardio-vascular diseases". It then qualified this response by distinguishing between causation in its "simple and most commonly understood sense" and a more sophisticated definition of causation. In its complete answer to DOJ's question, British American Tobacco wrote that causes of lung cancer, chronic obstructive pulmonary disease, and cardiovascular diseases "are complex, and the mechanism of causation, as well as the possible role of any cigarette smoke constituent in causation, have not been scientifically established".<sup>19</sup>
- Brown & Williamson stated that "the strength of the statistical evidence and lack of an alternative explanation for the increased risk of disease in groups of smokers, coupled with the fact that the experimental evidence does not refute the conclusion that smoking causes disease, leads Brown & Williamson to concur that the best judgment is that smoking is a cause of certain diseases". It then qualified this response by explaining that the company's "best judgment" is simply one way to interpret the evidence. The company further stated that "Brown & Williamson recognizes that

on the state of the experimental evidence, others may reach different judgments".<sup>20</sup>

## B. Five of five tobacco companies deny environmental tobacco smoke causes disease

Leading scientific and medical organisations have concluded that breathing environmental tobacco smoke causes serious disease in non-smokers, killing thousands of Americans each year. The findings of these expert organisations, which include the US Surgeon General, the World Health Organization, the National Institutes of Health, the American Medical Association, the American Heart Association, the American Lung Association, and the American Cancer Society, are summarised in the appendix. Most recently, on 19 June 2002, after an expert review of thousands of scientific studies, the International Agency for Research on Cancer concluded that "the typical levels of passive exposure have been shown to cause lung cancer among never smokers".<sup>21</sup>

Despite this medical consensus, when asked to "describe your position with respect to whether environmental tobacco smoke ('ETS') causes disease" and "[a]dmit that environmental tobacco smoke ('ETS') causes disease in some people", not one of the five tobacco companies took the position that exposure to environmental tobacco smoke causes, contributes to, or even is a risk factor for disease:

- Philip Morris maintained that "environmental tobacco smoke ('ETS') has not been shown to cause the development of disease."<sup>22</sup> The company responded that "ETS exposure has not been shown to cause the development of lung cancer or heart disease in non-smokers."<sup>23</sup>
- Brown & Williamson responded that the company "does not believe that the scientific evidence, taken as a whole, is sufficient to establish that environmental tobacco smoke (ETS) is a cause of disease".<sup>24</sup> Specifically, Brown & Williamson indicated that it does not believe existing evidence is sufficient to establish that ETS is a cause of "lung cancer, heart disease or chronic obstructive pulmonary disease".<sup>25</sup>
- British American Tobacco responded that "the claim that ETS exposure has been shown to be a cause of chronic disease is not supported by the science that has developed over the past 20 years or so. It has not been established that ETS exposure genuinely increases the risk of non-smokers developing lung cancer, heart disease or chronic obstructive pulmonary disease."<sup>26</sup> British American Tobacco further stated: "To the extent that the scientific studies to date are used to suggest there is a risk of chronic disease in non-smoking adults from ETS exposure, it is too small to measure with any certainty."<sup>26</sup>
- Lorillard responded that "no consistent statistically significant association and no cause and effect relationship have been demonstrated between surrogates for exposure to environmental tobacco smoke and disease in nonsmokers".<sup>18</sup>
- RJ Reynolds responded that the company "does not believe that the scientific evidence concerning ETS establishes it as a cause of, or a risk factor for, lung cancer, heart disease, or any other disease in adult nonsmokers".<sup>15</sup>

\*On its website, Philip Morris states that public health officials "have concluded that secondhand smoke . . . causes or increases the risk of diseases" and provides links to websites setting out the views of the public health officials. Philip Morris USA, *Health issues and secondhand smoke* (online at <http://www.philipmorrisusa.com>, file: Tobacco Issues). Omitted from the website statement on environmental tobacco smoke is the fact that, as can be seen from the court filings, Philip Morris actually disagrees with the public health officials that environmental tobacco smoke causes disease.



Several of the defendants acknowledged that environmental tobacco smoke is not totally innocuous. Brown & Williamson stated that it “recognizes that smoking can be annoying and irritating to nonsmokers, and is committed to the development of practical ventilation-based solutions that will reduce this annoyance”.<sup>24</sup> British American Tobacco similarly acknowledged that “smoking can cause discomfort to nonsmokers”.<sup>27</sup> Philip Morris wrote that it “recognizes that under certain exposures, environmental tobacco smoke can cause irritative responses such as a runny nose and tearing eyes”.<sup>23</sup> None of these claims made reference to medical literature. Aside from runny nose, tearing eyes, annoyance, irritation, and discomfort, however, these companies did not accept that any real health harms of any kind accrue to non-smokers exposed to environmental tobacco smoke.

### C. Four of five tobacco companies fail to admit that nicotine is addictive

The US Surgeon General,<sup>28</sup> the World Health Organization,<sup>29</sup> the American Society of Addiction Medicine,<sup>30</sup> the Royal Society of Canada,<sup>31</sup> and the British Royal College of Physicians<sup>32</sup> have all reviewed extensive laboratory, clinical, and epidemiological evidence and found the chemical nicotine to be addictive. These organisations have concluded that cigarette smoking is addictive because of the biological effects of nicotine.

During the pre-trial filings in the DOJ case, however, when asked to “[a]dmit that nicotine is a substance in cigarettes that is addictive”, only one of the five tobacco companies did so. Brown & Williamson stated that it “admits that nicotine is a substance in cigarettes that can be addictive, under the definition of ‘addiction’ used in the 1988 Surgeon General’s Report”.<sup>24</sup>

The remaining four companies all failed to accept that nicotine is addictive or even state that cigarette smoking is addictive because of nicotine. Instead, the companies’ responses included the longtime industry objection that only under an unacceptably broad definition of “addiction” would smoking be considered addictive. This argument not only misunderstands the definition of addiction, but also has been rejected by the world’s scientific and medical authorities.<sup>33</sup> The pre-trial filings show:

- Lorillard stated that “after reasonable inquiry . . . the information known or readily obtainable by Lorillard is insufficient to enable Lorillard to further admit or deny this [r]equest”.<sup>18</sup> The company admitted only that cigarette smoking “can be addictive”<sup>18</sup> while adding that “the definition of the term ‘addiction’ has been broadened to a point where it can now be said to describe any number of repetitive pleasurable activities that can be difficult to stop”.<sup>18</sup>
- RJ Reynolds did not directly answer DOJ’s request to admit that nicotine is addictive. Instead, the company referred to its answer on whether cigarette smoking is addictive. In that answer, the company stated that it “admits that many people believe that cigarette smoking (or the nicotine in cigarette smoke) is ‘addictive’ and, as that term is commonly used today, it is”. RJ Reynolds then argued: “Under the new ‘definition’ for ‘addiction,’ many common, pleasurable activities would be considered ‘addictive.’”<sup>15</sup>
- British American Tobacco also did not directly reply to the request to admit that nicotine is addictive. In reply to a request to admit that cigarette smoking is addictive, the company objected that the question “improperly seeks to reduce a complicated scientific subject to a simple affirmative or negative response”. British American Tobacco then repeated the position of RJ Reynolds: “[B]ased on the common understanding today, cigarette smoking can be termed addictive.”<sup>26</sup>
- While admitting cigarette smoking is addictive, Philip Morris denied that nicotine is addictive.<sup>23</sup> In its discussion of

why it considered cigarette smoking to be addictive, Philip Morris made no mention of nicotine and did not attempt to justify its position on scientific grounds: “Philip Morris states that there are and have been various definitions of ‘addiction’ over the years and the definition of ‘addiction’ as used by the public health community has changed over the years. However, Philip Morris decided as a matter of corporate policy to refrain from publicly debating the appropriate definition of ‘addiction’.”<sup>23</sup>

### D. Individual companies continue to deny specific corporate behaviours

#### 1. Philip Morris continues to deny it has control over nicotine

In the mid-1990s, allegations that Philip Morris and other companies controlled the content of nicotine in its cigarettes received extensive publicity. Philip Morris sued ABC News over a report that alleged nicotine manipulation,<sup>34</sup> and chief executive officer William I Campbell testified before Congress that “Philip Morris does not ‘manipulate’ or independently ‘control’ the level of nicotine in our products”.<sup>35</sup>

In 1996, however, former company officials revealed to the Food and Drug Administration that the company used many chemical, blending, and design methods to alter nicotine delivery and obtain target nicotine levels. Former Philip Morris Director of Applied Research William Farone stated:

The industry employs two principal means of controlling the nicotine levels: 1. By modification and control of the tobacco blend, i.e., the ratio of Burley (air cured), Bright (flue cured), Oriental, stems, expanded tobacco products, and reprocessed tobacco products such as tobacco sheet made from stems and waste leaf. 2. By modification of the construction of the cigarette such as filter type, the type of filter material used, the number and placement of ventilation holes, the density composition and porosity of the cigarette paper, the length and diameter of the paper[,] and the types and amounts of flavor additives.<sup>36</sup>

Former Philip Morris Associate Senior Scientist Ian L. Uydess, PhD, further stated that Philip Morris used such technologies to create tobacco products with varying levels of nicotine:

In the case of nicotine, specific levels of nicotine would be targeted in the test products (test ‘articles’) in a range that extended from ‘ultra-low’ (or even zero) nicotine deliveries, to deliveries equal to, or slightly above that found in some of their own (or a competitor’s) ‘full-flavor’ or ‘full-bodied’ products. This was done to examine how the smoker would react to various nicotine levels as a predictor of how well these products might do in the market.<sup>37</sup>

Despite these revelations, and other tobacco companies’ admission of their control over nicotine,† Philip Morris denied such practices in the DOJ pre-trial process. In response to DOJ’s question, “Admit that you are able to alter and/or control the amount of nicotine in your cigarettes as they are

†For example, Brown & Williamson stated that “it is able, to a degree, to vary the amount of nicotine in its cigarettes as they are manufactured, through tobacco blending, use of reconstituted tobacco, expanded tobacco and reduced tobacco weight. Brown & Williamson has used these techniques and other processes for reducing nicotine in cigarette smoke to offer smokers of cigarettes a range of nicotine values, using the FTC method.”<sup>24</sup>

manufactured”, Philip Morris “denie[d] that it independently ‘controls’ the nicotine content of its cigarette filler or the FTC nicotine yields of cigarette smoke”.<sup>23</sup> Philip Morris provided the same denial in response to the following requests for admission: “[a]dmit that you do alter and/or control the amount of nicotine in your cigarettes as they are manufactured”; “[a]dmit that you are able to alter, affect and/or limit the amount of nicotine delivered to the smoker of your cigarettes”; and “[a]dmit that you are able to alter and/or control the nicotine-to-tar ratio in your cigarettes as manufactured.”<sup>23</sup>

## 2. RJ Reynolds continues to deny it has marketed to children

Over the last decade, internal documents from RJ Reynolds have revealed company plans to market cigarettes to children as young as 14 years of age. For example, in a 1974 presentation to the RJ Reynolds board of directors, CA Tucker, the vice president for marketing, said: “They represent tomorrow’s cigarette business. As this 14–24 age group matures, they will account for a key share of the total cigarette volume—for at least the next 25 years.”<sup>38</sup> Mr Tucker’s solution was to “[d]irect advertising appeal to the younger smokers”.<sup>38</sup> Other documents showed the company tracked rates of smoking in children as young as 12.<sup>39 40</sup>

Moreover, RJ Reynolds used Joe Camel, a cartoon character, to lead a marketing campaign in the 1980s that increased the company’s share of the illegal teen market from 0.5% to 32.8% in just three years.<sup>41</sup> During the campaign, Joe Camel became as recognisable to young children as Mickey Mouse<sup>42</sup> and appealed more to children than to adults.<sup>41</sup>

RJ Reynolds’s marketing to children appears to continue to the present day. In June 2002, San Diego Superior Court Judge Ronald Prager fined the company \$20 million for continuing to target children in magazine advertising.<sup>8</sup>

Despite this evidence, RJ Reynolds denied targeting children in its responses to DOJ. When asked in the pre-trial process to “[a]dmit that, at various times from 1954 to the present, you have targeted marketing to persons under 18 years of age”, RJ Reynolds answered: “Reynolds is not aware that any of its marketing programs from 1954 to the present have targeted persons under the age of 18.”<sup>15</sup>

## 3. British American Tobacco continues to deny document destruction

Recent disclosures have established that British American Tobacco destroyed, caused to be destroyed, or was aware of the destruction of documents to avoid their use against the company in smoking and health litigation. In March of this year, an Australian court entered judgment in favour of a woman with terminal lung cancer against British American Tobacco Australia Services Limited (BATAS), which is the successor to British American Tobacco’s Australian subsidiary.<sup>43</sup> The court struck BATAS’s defence after finding that the company had destroyed thousands of pages of documents through a “document retention policy” that had as a primary purpose ensuring the destruction of materials that would be harmful to the defence of smoking and health litigation.<sup>43</sup> Evidence reviewed by the judge included an extensive memorandum written by Andrew Foyle, a lawyer with British American Tobacco’s law firm in the UK. The memo indicated that documents were being destroyed and sought advice for a protective legal strategy for the company.<sup>43</sup> This document has now become an issue in the DOJ case.‡

Most recently, in August 2002, DOJ filed in federal court the deposition testimony of David Schechter, the former general counsel for British American Tobacco’s US subsidiary and former consultant to British American Tobacco.<sup>44</sup> In the deposition, Mr Schechter made numerous statements indicating that British American Tobacco’s “document retention policy” aimed to protect the company in litigation:

- Mr Schechter was asked: “Was the concern that documents would end up in the hands of a plaintiff, was that concern in any way a motivating purpose behind BatCo’s document management policies, as you understood them?”<sup>44</sup> He responded:

Well, one of the purposes of the document retention program was to keep documents as long as needed and for business, tax, audit, and legal reasons.

And after they no longer needed to be kept and local counsel said it was legal that they could be thrown out, then we thought they should be thrown out. And there are a number of advantages in doing that.

One advantage is . . . it would prevent costly time-consuming discovery and it could also prevent documents that could be taken out of context from falling in the hands of plaintiffs.

. . . But taking that into context, I would say that that was one of the purposes of the document retention program.<sup>44</sup> [emphasis added]

- Mr Schechter was also asked whether “one of the benefits of limiting such retention [of documents] was that documents would not fall into the hands of plaintiffs or the public or the newspapers”.<sup>44</sup>§ Mr Schechter replied: “That was the – that was the purpose of both the mental copy rule and the program as a whole.”<sup>44</sup>
- With regard to inquiries Mr Schechter had made as to the legality under Australian law of destroying documents, Mr Schechter stated: “The reason why I wanted to know whether it was legal in Australia to destroy documents when there was no litigation was so that we could do that and it would be legal, and the result would be to prevent the documents being used against the company in litigation.”<sup>44</sup> [emphasis added]

Nonetheless, during the discovery process, British American Tobacco expressly denied it had destroyed, had caused to be destroyed, or was aware of the destruction of documents to prevent their use in litigation. Specifically, DOJ asked British American Tobacco to “[a]dmit that at some point from 1954 to the present, you have destroyed, caused to be destroyed, or were aware of the destruction of documents because the documents would have been adverse to you if they had been produced in discovery during smoking and health litigation or otherwise”. In response, British American Tobacco denied that it had done so.<sup>26</sup>

‡At the request of DOJ, the court in the US lawsuit ordered British American Tobacco to turn over the Foyle memo. British American Tobacco, however, refused to provide the memo and is appealing the judge’s discovery order. See Memorandum-Opinion, *U.S. v. Philip Morris Inc.*, No. 99-CV-2496 (D.D.C. 10 July 2002). Oral arguments on that appeal were held on September 3, 2002. BATAS recently won an appeal of the Australia decision. *British American Tobacco Australia Svcs. v. Cowell*, 2002 VSCA 197. 6 December 2002. That decision will be appealed. *Trust fund launched to keep McCabes together*, *The Age* (Melbourne), 8 (11 December 2002).

§Mr Schechter had previously explained: “The mental copy rule was to assume that everything you wrote was going to wind up in the hands of – was going to wind up on the front page of the local newspaper.” He then responded affirmatively when asked: “Would it also be to assume that documents could wind up in litigation?”<sup>44</sup>

## CONCLUSION

Despite their attempts to portray themselves as new and responsible companies, leading cigarette manufacturers continue to deny or evade in the DOJ litigation the truth about the health effects of smoking, the harm of environmental tobacco smoke, and the addictiveness of nicotine. Moreover, Philip Morris, RJ Reynolds, and British American Tobacco have also not accepted evidence of their corporate behaviour regarding control of nicotine in cigarettes, marketing to children, and document destruction. Their misleading and evasive statements conflict with the companies' assertions that they have reformed.

## APPENDIX

### Scientific and medical organisations have concluded environmental tobacco smoke causes disease

While the five leading tobacco companies do not accept that environmental tobacco smoke causes disease in non-smokers, the consensus of medical and scientific authorities is that environmental tobacco smoke does cause disease. Leading organisations that have found environmental tobacco smoke to cause harm include:

- *US Surgeon General*—Over the years, the Surgeon General has issued several reports addressing the effects of environmental tobacco smoke. The reports rely upon numerous scientific studies, meta-analyses, and reports of studies; are prepared with the assistance of experts in epidemiology, pharmacology, the behavioural sciences, medicine, and public health policy; and undergo a rigorous and multi-tiered review process. In 2000, the Surgeon General found that “[t]he detrimental health effects of exposure to ETS are well established”, including lung cancer.<sup>45</sup> According to the Surgeon General: “ETS also has subtle but significant effects on the respiratory health (including cough, phlegm production, and reduced lung function) of adult nonsmokers . . . Among children, ETS . . . causes bronchitis and pneumonia . . . middle ear diseases . . . [and] causes additional episodes of asthma and increases its severity.”<sup>45</sup> With respect to women who are lifetime nonsmokers, the Surgeon General determined that “[e]xposure to environmental tobacco smoke is a cause of lung cancer [and] . . . coronary heart disease”.<sup>12</sup>
- *National Cancer Institute (NCI)*—In 1999, the NCI published the results of a comprehensive assessment of the health effects resulting from environmental tobacco smoke exposure. The study was based primarily upon published, peer reviewed scientific literature, but also drew from numerous other sources including abstracts of meeting presentations, doctoral dissertations, and information received in response to formal requests and through the public review process.<sup>46</sup> The report found that “ETS is causally associated with a number of health effects . . . including fatal outcomes such as sudden infant death syndrome and heart disease mortality, as well as serious chronic diseases such as childhood asthma”.<sup>46</sup> Other significant health risks identified by the study include: lung cancer, nasal sinus cancer, acute and chronic coronary heart disease morbidity, eye and nasal irritation, acute lower respiratory tract infections in children, exacerbation of asthma in children, and middle ear infections in children.<sup>46</sup>
- *Environmental Protection Agency (EPA)*—In 1993, the EPA released a report that evaluated the respiratory health effects of environmental tobacco smoke. The report considered 31 epidemiological studies on lung cancer and environmental tobacco smoke, over 50 studies regarding respiratory disorders and chronic middle ear diseases in children and environmental tobacco smoke, six studies of the effects of environmental tobacco smoke on adult respiratory symptoms and lung function, and eight studies of maternal smoking and sudden infant death syndrome (SIDS).<sup>47</sup> The report was subject to an extensive open review by the public and by a panel of independent scientific experts. According to the report, “ETS is a human lung carcinogen, responsible for approximately 3,000 lung cancer deaths annually in U.S. nonsmokers”.<sup>46</sup> The report also determined that children exposed to environmental tobacco smoke are more likely to suffer from lower respiratory tract infections, such as bronchitis and pneumonia; upper respiratory tract irritation; reduced lung function; fluid in the middle ear; asthma; and increases in the number and severity of episodes in asthmatic children.<sup>46</sup>
- *Department of Health and Human Services, National Toxicology Program (NTP)*—The NTP prepares a biennial *Report on Carcinogens* that identifies and discusses substances that may pose a carcinogenic hazard to human health. The report relies upon human and animal studies and undergoes several scientific reviews. According to the NTP, “[e]nvironmental tobacco smoke (ETS) is known to be a human carcinogen based on sufficient evidence from studies in humans that indicate a causal relationship between passive exposure to tobacco smoke and human lung cancer”.<sup>48</sup>
- *The National Heart, Lung and Blood Institute of the National Institutes of Health (NHLBI)*—The NHLBI developed an evidence based global strategy for asthma management and prevention in consultation with the World Health Organization. Relying upon scientific publications, written by experts in the scientific community, and reviewed by both individuals and medical societies, the NHLBI found: “The most important measure [for avoidance of indoor air pollutants] is to avoid passive and active smoking. Passive smoking increases the risk of allergic sensitization in children. It also increases the frequency and severity of symptoms in children with asthma. Parents of children with asthma should be advised not to smoke and not to allow smoking in rooms their children use.”<sup>49</sup>
- *World Health Organization (WHO), International Consultation on Environmental Tobacco Smoke and Child Health*—The WHO brought together international experts to examine the effects of environmental tobacco smoke on child health. The experts relied upon scientific reports and background papers, which in turn were based on the review of numerous scientific studies on environmental tobacco smoke and children. The experts concluded: “ETS exposure causes a wide variety of adverse health effects in children, including lower respiratory tract infections such as pneumonia and bronchitis, coughing and wheezing, worsening of asthma, and middle ear disease. Children’s exposure to environmental tobacco smoke may also contribute to cardiovascular disease in adulthood and to neurobehavioural impairment . . . [I]nfant exposure to ETS may contribute to the risk of SIDS.”<sup>50</sup>
- *American Cancer Society (ACS)*—The ACS describes the detrimental effects of environmental tobacco smoke as including lung cancer, heart disease, reduced lung function, lower respiratory tract infections in children, and increased number and severity of asthma attacks in children.<sup>51</sup>
- *American Medical Association (AMA)*—The AMA House of Delegates passed a policy position on ETS, based on professional principles and scientific standards. The longstanding AMA policy, which reflects the consensus viewpoint of thousands of physicians, “supports the classification of environmental tobacco smoke as a known human carcinogen” and notes that “available evidence indicates that passive smoke exposure is associated with increased risk of sudden infant death syndrome and of cardiovascular disease”.<sup>52</sup>
- *American Heart Association (AHA)*—The AHA published an annual report in 2002 providing statistics relating to heart



and blood vessel diseases. In compiling the statistics, the AHA worked closely with governmental agencies to obtain the latest data from major US studies.<sup>53</sup> According to the AHA: “[a]bout 37,000–40,000 nonsmokers die from CVD [cardiovascular disease] each year as a result of exposure to environmental tobacco smoke . . . The risk of death from CHD [coronary heart disease] increases by up to 30 percent among those exposed to environmental tobacco smoke at home or work.”<sup>53</sup>

- **American Lung Association (ALA)**—The ALA describes the negative health effects of environmental tobacco smoke as including lung cancer; heart disease; and, in children, lower respiratory tract infections, exacerbation of asthma, pneumonia, ear infections, and bronchitis.<sup>54</sup>
- **American Academy of Pediatrics (AAP)**—The AAP has issued policy statements addressing environmental tobacco smoke and children. The policy statements resulted from reviews of scientific studies. According to the AAP Committee on Substance Abuse: “exposing . . . children to ETS increases the risk of asthma, sudden infant death syndrome, middle ear disease, pneumonia, cough, upper respiratory infection, lower high-density lipoprotein cholesterol levels, and coronary artery disease. Exposure to ETS before age 10 years increases the risk of developing leukemia and lymphoma as an adult.”<sup>55</sup> The Committee on Environmental Health reached similar conclusions several years earlier.<sup>56</sup>

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Additional materials related to this article can be found at: [http://reform.house.gov/min/inves\\_tobacco/index\\_doj.htm](http://reform.house.gov/min/inves_tobacco/index_doj.htm).

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